Supreme Court, U.S.
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No. 02-909 (3)

In The Supreme Court of the United States

THREE O REALTY, LLC,

Petitioner,

v.

NEW YORK STATE URBAN DEVELOPMENT CORPORATION D/B/A EMPIRE STATE DEVELOPMENT CORPORATION, and 42nd STREET DEVELOPMENT PROJECT, INC.,

Respondents.

On Petition For Writ Of Certiorari To The New York Court Of Appeals

REPLY BRIEF FOR PETITIONER

MARCI A. HAMILTON, ESQ.
36 Timber Knoll Drive
Washington Crossing, PA 18977
Telephone: (215) 493-1973
Facsimile: (215) 493-1094
hamilton02@aol.com
Counsel of Record

MARK I. SILBERBLATT, ESQ.
NOVACK BURNBAUM CRYSTAL, LLP
300 East 42nd Street
New York, NY 10017
Telephone: (212) 682-4002
Facsimile: (212) 986-2007
msilberblatt@nbclaw.com

Attorneys for Petitioner

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OR CALL COLLECT (402) 342-2831

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REPLY

I.

Respondents rightly concede that where the factfindings supporting a taking are pretextual the taking is unconstitutional. Resp. at 24. ("No case has ever held that a pretextual blight finding is sufficient" for takings purposes.). Respondents fail, however, to rebut the fact that there is a split in the lower courts regarding whether the courts will ask whether blight findings are pretextual. *See* Pet. at 21-24. Some courts accept at face value the sort of vague and general claims to blight made in this case, and others look beneath the blight findings to ensure that they rest on fact and not fiction. That is a split worthy of this Court's attention.

The Respondents' attempt to paint this case as consistent with prior Supreme Court precedent also fails. When the Supreme Court has addressed the Takings Clause's public use requirement, it simply has not been faced with the question whether the factfindings were pretextual or actual. *See National RR Passenger Corp. v. Boston and Maine Corp.*, 503 U.S. 407 (1992); *Hawaii Housing Authority v. Midkiff*, 467 U.S. 229 (1984); *Berman v. Parker*, 348 U.S. 26 (1954). In these cases, substantial evidence was assembled in advance of the taking to support the public use conclusion. The Court never has intimated that local and state governments have latitude to make up the facts underlying a blight finding. Nor has it upheld a finding of public use in a case such as this one where the development authority made its relevant blight determinations only *after* it publicly declared its purpose to take the property. This case squarely presents the issue whether the courts, in deferring to the findings of takings authorities, may examine whether the blight findings are

pretextual. The Supreme Court has not addressed this issue and should do so in this case.

II.

Respondents repeatedly intone that the record is adequate to support an actual finding of blight at Site 8 South, claiming that there has been an unbroken record of blight on the sight. Resp. at 2, 7, 10-11, 17. Yet, Respondents fail to note for this Court that in 1994 they stated that it might be unnecessary to take Site 8 South for purposes of the 42nd Street Development Project. Rec. at 160 (1994 Determination and Findings) (considering eliminating Site 8 South from the 42nd Street Development Project).[1] In other words, the so-called blighted nature of Site 8 South was insufficient to require condemnation as of 1994 – at a time when the Times Square area was significantly less developed than it now is. Once the New York Times entered the picture, however, the ESDC resumed its pre-1994 refrain of blight, as though it had never considered Site 8 South sufficiently improved to remove it from the Project. Moreover, only *after* the New York Times deal was made did the ESDC craft the Environmental Review Technical Assessment ("ERTA") on which it now relies to prove ongoing blight. Resp. at 10-15.

The ESDC should not be permitted to rely on post-hoc blight findings to justify a taking. To hold otherwise is to

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[1] Record citations are taken from the printed record in the Supreme Court of the State of New York, Appellate Division, First Department.

take us through the Constitution's looking glass and to permit governments to take first, and justify later.

The ERTA proves its pretextual nature through its overstatement when it declares that "*all* of the Site 8 S stores are inconsistent with the overall Project's scale. . . . *None* of the existing uses support the Project goals. . . . such as restoring the Project area's role as a positive influence on the adjacent communities, and increasing the Project area's economic contribution to the City as a whole." Resp. at 11 (emphasis added). Respondents conveniently ignore the fact that Petitioner Three O Realty's 16-story building was at maximum capacity, with a waiting list of tenants and high-quality tenants in place like fashion designer Donna Karan, when the ESDC declared its intent to condemn the property for the benefit of the New York Times. They also ignore the significant investment sunk into Three O's building, the development of which clearly served the economic interests of Site 8 South and contributed positively to the street life on 40th Street, which contrary to Respondents' description, is consistently busy with the sort of pedestrian traffic sought by the 42nd Street Development Project.

III.

The Respondents also imply that Petitioner somehow failed to rebut their findings in the record. In effect, they misrepresent the New York procedure. The New York takings procedure makes it impossible for taking subjects to challenge the facts claimed by the ESDC. *See* Pet. 4-5 (Sec. 207). There was simply no opportunity to rebut the unilateral, unproven, and untrue factual claims of the ESDC. Were this Court to grant certiorari, Petitioner

would request that it reverse the decision below and order New York to institute some means by which those subject to a taking may present evidence to challenge blight findings for the purpose of ensuring the record supporting a taking is accurate, rather than a pretext.

Respectfully submitted,

MARCI A. HAMILTON, ESQ.
36 Timber Knoll Drive
Washington Crossing, PA 18977
(215) 493-1973
(215) 493-1094 (fax)
hamilton02@aol.com
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NOVACK BURNBAUM CRYSTAL, LLP
300 East 42nd Street
New York, NY 10017
(212) 682-4002
(212) 986-2007 (fax)
msilberblatt@nbclaw.com

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